

JAN 27 2009

**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

**MUR 5987**

**DATE COMPLAINT FILED: 03/31/08**

**DATE OF NOTIFICATION: 02/13/08**

**LAST RESPONSE RECEIVED: 05/16/08**

**DATE ACTIVATED: 06/24/08**

**EXPIRATION OF SOL: 3/17/13 - 4/09/13**

**COMPLAINANT:**

**American Right to Life Action**

**RESPONDENTS:**

**Senator Hillary Clinton**

**Hillary Clinton for President and Shelly**

**Moskwa, in her official capacity as treasurer**

**Sir Elton John**

**MUR 5995**

**DATE COMPLAINT FILED: 04/15/08**

**DATE OF NOTIFICATION: 04/16/08**

**LAST RESPONSE RECEIVED: 05/30/08**

**DATE ACTIVATED: 06/24/08**

**EXPIRATION OF SOL: 3/17/13 - 4/09/13**

**COMPLAINANT:**

**Thomas Fitton, President of Judicial Watch,  
Inc.**

**RESPONDENTS:**

**Senator Hillary Clinton**

**Hillary Clinton for President and Shelly**

**Moskwa, in her official capacity as treasurer**

**Sir Elton John**

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**MUR 6015**

**DATE COMPLAINT FILED: 04/18/08**

**DATE OF NOTIFICATION: 04/30/08**

**LAST RESPONSE RECEIVED: 05/20/08**

**DATE ACTIVATED: 06/24/08**

**EXPIRATION OF SOL: 3/17/13 - 4/9/13**

**COMPLAINANT:**

**Al Westcott**

**RESPONDENTS:**

**Senator Hillary Clinton  
Hillary Clinton for President and Shelly  
Moskwa, in her official capacity as treasurer  
Sir Elton John**

**RELEVANT STATUTES AND  
REGULATIONS:**

**2 U.S.C. § 441e  
11 C.F.R. § 110.20(i)**

**INTERNAL REPORTS CHECKED:**

**Disclosure Reports**

**FEDERAL AGENCIES CHECKED:**

**None**

**I. INTRODUCTION**

This matter arises from three complaints alleging that presidential candidate Hillary Clinton ("Senator Clinton") and her authorized committee, Hillary Clinton for President, and its treasurer, Shelly Moskwa, ("the Committee") may have received an in-kind contribution from a foreign national in violation of 2 U.S.C. § 441e. Specifically, the complaints allege that Sir Elton John ("Elton John") performed at a concert organized by the Committee on April 9, 2008 at Radio City Music Hall and that this performance constitutes an in-kind contribution from Elton John to the Committee in violation of 2 U.S.C. § 441e. See Complaints. The complaints further allege that Elton John, through

1 the Committee, sent out a mass email announcing the concert and soliciting support for  
2 Senator Hillary Clinton's presidential campaign in violation of 2 U.S.C. § 441e. *Id.*

3 Based on the available information, including written responses from the  
4 respondents, which demonstrate that the Committee paid all of the event costs and that  
5 Elton John's involvement in the organizing of the concert was limited to the direction of  
6 his artistic performance and the direct and indirect control of the use of his name and  
7 likeness, we recommend that the Commission find no reason to believe that that the  
8 Respondents have violated the Act in the three complaints and close the files.

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 On April 9, 2008, Sir Elton John performed at a solo concert on behalf of the  
11 Committee at Radio City Music Hall in New York. *See* MUR 5995 Complaint,  
12 Attachment 1. Before the event, the Committee drafted and sent out a mass electronic  
13 mail, on behalf of Elton John, announcing the concert and soliciting support for the  
14 Committee. *Id.* Ultimately, the concert raised more than \$2.5 million (from the sale of  
15 5,000 tickets) for the Committee. *See* MUR 5995 Complaint, Attachment 3.

16 As more fully discussed below, Elton John's artistic performance at the  
17 Committee's fundraiser constitutes a volunteer service that is exempted from the  
18 definition of "contribution" under the Act. Therefore, the Committee has not received an  
19 in-kind contribution from a foreign national as alleged in the complaints. In addition,  
20 there is no information to suggest that the electronic mail communication distributed by  
21 the Committee, using Elton John's name and likeness, to announce the concert and solicit  
22 support for Senator Clinton constitutes participation in the decision-making process of  
23 the Committee on the part of Elton John in violation of 2 U.S.C. § 441e.

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**A. Concert Performance**

It is unlawful for a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value, or make an expenditure in connection with a Federal, State, or local election. 2 U.S.C. § 441e. It is also unlawful for a person to solicit, accept, or receive a contribution or donation from a foreign national. *Id.* A "foreign national" is an individual who is not a citizen of the United States or a national of the United States and who is not lawfully admitted for permanent residence. *Id.* The term "individual" has been interpreted by the Commission to include foreign nationals. *See* Explanation and Justification for Contribution Limitations and Prohibitions, 67 Fed. Reg. 69946 (Nov. 19, 2002). The term "contribution" does not include the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee. *See* 2 U.S.C. § 431(8)(B)(i); and 11 C.F.R. § 100.74 (the so-called "volunteer services exemption"). Because Elton John appears to have provided uncompensated services to the Committee in a volunteer capacity, we conclude that his concert performance meets the criteria for the volunteer services exemption and, therefore, does not constitute a contribution by a foreign national in violation of 2 U.S.C. § 441e.

The complaints assert that Advisory Opinion 1981-51 (Metzenbaum) supports the conclusion that Elton John's artistic performance does not meet the criteria for the exemption and thus constitutes an in-kind contribution under the Act and a violation of Section 441e. We agree with the responses to the complaints, however, that this advisory opinion is distinguishable and that other more recent advisory opinions support the conclusion that the exemption applies here.

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1           Advisory Opinion 1981-51 concerned a campaign committee that planned to have  
2   an artist, who was a foreign national, create original artwork and allow the committee to  
3   reproduce, at its own cost, a limited edition of the original artwork for fundraising  
4   purposes. *See* Advisory Opinion 1981-51. The committee asked whether this proposed  
5   activity would constitute a prohibited contribution or whether it would be permitted under  
6   the volunteer services exemption, and the Commission concluded that the activity would  
7   constitute a prohibited contribution. *Id.* In a brief opinion, the Commission explained  
8   that, under Section 441e, a foreign national may not donate his volunteer services for  
9   purposes of providing original artwork for the committee's use in fundraising and that,  
10   because of this conclusion, the Commission did not reach the issue of whether the  
11   volunteer services exemption applied to the proposed activity. *Id.*

12           A few years later, in Advisory Opinion 1987-25 (Otaola), the Commission  
13   considered whether a foreign national could work, without any compensation, as a  
14   volunteer for a 1988 presidential campaign and concluded that the proposed activity  
15   would not violate Section 441e because it would fall within the volunteer services  
16   exemption and, therefore, would not constitute a contribution by the foreign national. In  
17   effect, unlike in Advisory Opinion 1981-51, the Commission considered whether the  
18   exemption applied before determining whether the activity would violate Section 441e.  
19   In support of its conclusion that the exemption applied, the Commission cited similar  
20   advisory opinions that did not involve foreign nationals but nevertheless concluded that  
21   volunteering for campaigns is the type of uncompensated volunteer service that is  
22   specifically exempted from the definition of "contribution." *See* Advisory Opinion 1987-  
23   25; *see also* Advisory Opinion 1984-43 (Brunswick) (donation of corporate officer's

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1 volunteer services to appear in a campaign advertisement not considered a contribution);  
2 Advisory Opinion 1982-31(Koenig) (a student may volunteer uncompensated services to  
3 a campaign without making a contribution).

4 A review of the tape recording of the Commission's consideration of the draft  
5 for Advisory Opinion 1987-25 (Otaola) reveals that three Commissioners, who had  
6 previously approved Advisory Opinion 1981-51 (Metzenbaum), believed that 1981-51  
7 should not be superseded or overruled in any manner. See Commission Executive  
8 Session recording for September 10, 1987, regarding Advisory Opinion 1987-25  
9 (Otaola). The basis for that position appears to have been the notion that Section 441e  
10 represented a "sweeping prohibition" against allowing foreign nationals to engage in any  
11 fundraising aspect of the election process. *Id.* However, other Commissioners believed  
12 just as strongly that Congress did not create any distinction between types of volunteer  
13 services in which foreign nationals could engage and that none should be created in  
14 Advisory Opinion 1987-25. *Id.* Some of the Commissioners appeared willing to draw a  
15 distinction between the types of volunteer activity present in Advisory Opinions 1981-51  
16 and 1987-25 in order to reach a consensus, namely that the activity in Advisory Opinion  
17 1981-51 concerned service related to fundraising and the activity in Advisory Opinion  
18 1987-25 concerned service unrelated to fundraising. *Id.*

19 In the final analysis, the Commission agreed to approve the 1987-25 opinion,  
20 thereby allowing the volunteer activity proposed by Otaola with the understanding that  
21 there was no fundraising element in the proposed activity. *Id.* Accordingly, the Otaola  
22 opinion noted that the Commission considered the extent to which this conclusion

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1 conflicts with Advisory Opinion 1981-51 and declined by a vote of 2-4 to supersede or  
2 overrule the opinion. *Id.*

3 More recently, the Commission has cited to Advisory Opinion 1987-25 in  
4 concluding in two subsequent advisory opinions that volunteer services by foreign  
5 nationals would not constitute prohibited contributions, including one opinion that  
6 contemplated fundraising by a foreign national. *See* Advisory Opinion 2004-26 (Weller)  
7 (campaign-related activities by a foreign national spouse (fiancée) without compensation,  
8 including soliciting contributions and support for a federal candidate, would not  
9 constitute a prohibited contribution); Advisory Opinion 2007-22 (Hurysz) (campaign-  
10 related activities by foreign nationals, including "lit drops, door to door canvassing,  
11 handing out literature at transit stations, telephone banking, and get out the vote"  
12 activities, would not constitute prohibited contributions). By contrast, the Commission  
13 has not relied upon Advisory Opinion 1981-51 in a subsequent advisory opinion.

14 In addition, there is a distinguishing factor between the proposed activity in  
15 Advisory Opinion 1981-51 and the proposed activities in the subsequent advisory  
16 opinions in that the former concerned the donation of a tangible good (original artwork  
17 and the right to reproduce it), whereas the latter concerned only donations of a service. In  
18 the present matter, Elton John's uncompensated concert performance would constitute  
19 the donation of service, not a tangible good, and is, therefore, significantly different from  
20 the activity considered in Advisory Opinion 1981-51. Further, the conclusion that the  
21 concert performance falls within the purview of the volunteer services exemption is  
22 consistent with Advisory Opinion 2007-08 (King) in which the Commission recently  
23 concluded that uncompensated performances by individuals in the entertainment industry

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1 would be exempt from the definition of "contribution" as long as the performers provided  
2 the services in their individual capacities and all costs associated with the performances  
3 themselves would be paid for by the federal candidate committee or party committee.  
4 *See* Advisory Opinion 2007-08. In this matter, Elton John appears to have donated his  
5 own personal services to the Committee, and the Committee paid for all the costs  
6 associated with the production of the concert event. *See* Committee Response,  
7 Attachment A.

8 Specifically, with respect to the costs, the Committee paid \$275,695 of the total  
9 \$278,328.70 in expenses submitted by Elton John prior to his concert performance on  
10 April 9, 2008. *See* Committee Response, Attachment A. These payments (\$275,695)  
11 were made by the Committee between March 17<sup>th</sup> and April 8, 2008, of which the  
12 majority were for the deposit for the venue rental (\$50,000), and costs associated with the  
13 actual concert including building services, stage labor, security, wardrobe, printing,  
14 equipment, sound system and license fees, etc. (\$138,211.16). *Id.* The remaining  
15 invoices, documented in the Committee's response, were paid on April 9<sup>th</sup>, April 24<sup>th</sup>,  
16 and May 9, 2008, totaling \$8,528.00. *Id.*

17 The Committee submitted a letter, dated August 14, 2008, supplementing its  
18 earlier response. *See* Supplemental Letter dated August 14, 2008. In the letter, the  
19 Committee states that it paid two invoices, totaling \$48,207.25, not previously submitted  
20 by Elton John in connection with the concert for expenses such as airline travel, hotel  
21 incidentals, per diems and ground transportation. *Id.* The letter attaches a copy of the  
22 two invoices and the payment check. *Id.* According to the documentation, the additional  
23 expenses were submitted to the Committee on June 12, 2008, after the complaints were

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1 filed and approximately 75 days after the concert. *Id.* Nevertheless, these expenses were  
2 paid immediately, approximately 75 days after the concert, and the vast majority of the  
3 expenses were paid before the concert.<sup>1</sup>

4 Accordingly, we conclude that the artistic performance donated by Elton John, a  
5 foreign national, in connection with the Committee's fundraising concert does not  
6 constitute an in-kind contribution to Senator Clinton or her Committee in violation of  
7 2 U.S.C. § 441e but rather is the type of volunteer activity specifically exempted from the  
8 Act.

9 **B. Alleged Participation in Decision-Making**

10 Commission regulations implementing 2 U.S.C. § 441e prohibit foreign nationals  
11 from participating in the decisions of any person involving election-related activities. *See*  
12 11 C.F.R. § 110.20(i). Such participation in decisions includes directing, dictating,  
13 controlling, or directly or indirectly participating "in the decision-making process of any  
14 person, such as a corporation, labor organization, political committee, or political  
15 organization with regard to such person's Federal or non-Federal election-related  
16 activities, such as decisions concerning the making of contributions, donations,  
17 expenditures, or disbursements in connection with elections for any Federal, State, or

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<sup>1</sup> The Commission recently approved the recommendations in the First General Counsel's Report in MUR 5998 (McCain), a matter that did not involve the volunteer services exemption but nevertheless raised the question of whether John McCain for President committee received an in-kind contribution from foreign nationals in connection with a fundraising event in London, England. In that matter, the committee did not receive an invoice for the costs associated with the event until 40 days after the event and six days after the complaint was filed. The committee paid the costs immediately, and the Commission found no reason to believe that the committee violated the Act on the basis that the committee paid all of the event costs and no information had been presented that would suggest the costs charged and payments made were outside the ordinary course of business.

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1 local office or decisions concerning the administration of a political committee.” *Id.* This  
2 broad prohibition encompasses foreign national involvement in the management of any  
3 political committee, and its decisions regarding its receipts and disbursements in  
4 connection with Federal and non-Federal elections. *See* Explanation and Justification for  
5 Regulations on Contribution Limitations and Prohibitions, 67 Fed. Reg. 69946 (Nov. 19,  
6 2002).

7 The Committee’s electronic mail is the only information that the complaints in  
8 MURs 5987 and 5995 provide as support for the allegation that Elton John participated in  
9 the decision-making process of the Committee in connection with the fundraising  
10 concert. The Committee states that it was responsible for drafting the language contained  
11 in the electronic mail as well as its mass distribution. *See* Committee Responses. Elton  
12 John admits to being involved only by allowing the direct and indirect use of his likeness  
13 and name with the Committee’s electronic mail but asserts that this does not amount to  
14 the type of decision-making envisioned by the regulations. *See* Elton John Response at 2;  
15 *see also* 11 C.F.R. § 110.20(i).

16 Elton John’s limited participation in the direct and indirect use of his likeness and  
17 name in the Committee’s electronic mail does not constitute participation in the decision-  
18 making process of the Committee. In fact, the pertinent regulation speaks of decisions  
19 concerning the making of contributions, donations, expenditures, or disbursements in  
20 connection with elections for any Federal, State, or local office or decisions concerning  
21 the administration of a political committee. *See* 11 C.F.R. § 110.20(i). The Commission  
22 considered the applicability of Section 110.20(i) of the regulations in Advisory Opinion  
23 2004-26 (Weller). Weller involved the question of whether the foreign national fiancée

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1 (Rios Sosa) of a candidate could engage in activities such as: attending committee events,  
2 participating in said events by speaking or soliciting funds, participating in meetings  
3 regarding events or political strategy or accompany the candidate to fundraising and  
4 campaign events of other political committees. *See* Advisory Opinion 2004-26. The  
5 Commission concluded that, based upon Section 110.20(i), Ms. Rios Sosa, as an  
6 uncompensated volunteer, could attend committee events, solicit funds from persons who  
7 are not foreign nationals, and give speeches at committee events. *Id.* at 3. However,  
8 while it allowed Ms. Rios Sosa to attend committee meetings regarding committee events  
9 or political strategy, the Commission concluded that she could not be involved in the  
10 management of the committees. *Id.* at 3.

11       Advisory Opinion 2004-26 is consistent with our conclusion that Elton John, as a  
12 foreign national, is allowed to provide uncompensated volunteer service to the  
13 Committee, including soliciting contributions from those who are not foreign nationals as  
14 long as he is not involved in the decision-making process of the Committee. *See also*  
15 Explanation and Justification for Regulations on Contribution Limitations and  
16 Prohibitions, 67 Fed. Reg. 69946 (Nov. 19, 2002). In the present matter, there is no  
17 information to suggest that Elton John had any involvement in the decision-making  
18 process of the Committee in connection with the making of contributions, donations,  
19 expenditures, or disbursements, as envisioned by 11 C.F.R. § 110.20(i). Therefore, we  
20 recommend that the Commission find no reason to believe that Elton John violated

2 U.S.C. § 441e by participating in the decision-making process of the Committee.<sup>2</sup>

**III. CONCLUSION**

Accordingly, we recommend that the Commission find no reason to believe that Senator Clinton and Hillary Clinton for President and Shelly Moskwa, in her official capacity as treasurer, and Sir Elton John violated 2 U.S.C. § 441e of the Act by receiving or making an in-kind contribution in connection with Sir Elton John's musical performance or that Sir Elton John violated 2 U.S.C. § 441e by participating in the decision-making process of the Committee.

**IV. RECOMMENDATIONS**

1. Find no reason to believe that Senator Hillary Clinton and Hillary Clinton for President and Shelly Moskwa, in her official capacity as treasurer, violated 2 U.S.C. § 441e;
2. Find no reason to believe that Sir Elton John violated 2 U.S.C. § 441e;
3. Approve the Factual and Legal Analyses;
4. Approve the appropriate letters; and
5. Close the files.


January 26, 2009  
Date

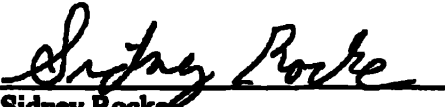
Thomasenia P. Duncan  
General Counsel

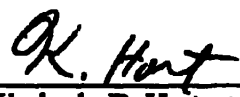
<sup>2</sup> MUR 5998 (McCain) also involved an allegation that foreign nationals participated in the decision-making process of the committee. The Commission adopted our conclusion, however, that the invitation to the fundraising event sent by the foreign nationals was insufficient to support an inference that the foreign nationals played any decision-making role in the committee, within the meaning of 11C.F.R. § 110.20(i). See MUR 5998 (McCain) First General Counsel's Report.

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